APV HILL & MILLS (M) SDN BHD

v.

AQ PACIFIC WIDE SDN BHD; EUROTRANS CHARTER SDN BHD (THIRD PARTY) (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
YAACOB ISMAIL J
[SUIT NO: D4-22-269-93]
10 OCTOBER 2002

SHIPPING: *Carriage of goods - Contract of carriage - Cost and freight contract - Failure of plaintiff to load equipment on board ship named in bill of lading - Whether plaintiff had failed to comply with principal term of contract - Whether plaintiff was in breach of contract - Whether plaintiff entitled to be indemnified by third party*

CONTRACT: *Terms - Breach - Cost and freight contract - Failure of plaintiff to load equipment on board ship named in bill of lading - Whether plaintiff had breached principal term of contract*

This was the plaintiff's application for a declaration that the plaintiff had performed its obligations pursuant to a cost and freight ('C&F') contract entered into with the defendant regarding the manufacture and supply of certain equipment. The plaintiff also sought a declaration that it was entitled to be indemnified by a third party that had been appointed by the plaintiff as freight forwarders in relation to the contract. The defendant, however, contended that since the equipment was never loaded on board the ship named in the bill of lading, the "Lady Jane", the plaintiff had not performed the C&F contract and was therefore not entitled to receive payment pursuant to the contract. The defendant further counterclaimed for the sum of RM1 million which was paid as advance for the contract, and in return for which the plaintiff issued a performance bond which should have been drawn down by the defendant.

Held:

[1] The defendant had absolutely lost the right to reject the equipment simply because the equipment was never shipped on board the ship named in the bill of lading nor any ship bound for the destination named in the bill of lading. The contract between the plaintiff and the defendant was a C&F contract, and since the equipment was never loaded on board the "Lady Jane" or any other ship bound for Benghazi, Libya, the ownership remained with the plaintiff. Despite the prohibition against transhipment, the plaintiff shipped the equipment on board the "Seng Leong" out of Port Klang for

reloading on the "Lady Jane". However, since the equipment was never loaded on the "Lady Jane", the plaintiff had clearly not complied with the principal term of the contract regarding transhipment and was therefore in breach of the agreement with the defendant. (pp 139 h, 141 i & 142 a)

[2] In the circumstances, the third party was not liable to indemnify the plaintiff as the third party had only carried out the instructions given by the plaintiff, which was fully aware of what was happening. The plaintiff did not want to associate itself with the export of this equipment for the reason that such export would have had attracted the attention of government authorities in London and Singapore in light of the then existing embargo against Libya. This was probably why the plaintiff did not want to be named as the shipper or exporter in the bill of lading. As far as the third party was concerned, it merely took instructions from the plaintiff, discharged its duties and got paid for its services. (pp 142 i & 143 a)

[Plaintiff's claims against defendant and third party dismissed. Defendant's counterclaim allowed. Plaintiff's application for Erinford injunction restraining defendant from making a demand on the performance bond pending appeal, also dismissed.]

Case(s) referred to:

Hindley & Co Ltd v. East Indian Produce Co Ltd [1973] Vol 2 Lloyd's Law Reports 515 QBD ***(refd)***

Panchaud Freres SA v. Etablissement General Grain Company [1970] Vol 1 Lloyd's Law Report 53 ***(refd)***

For the plaintiff - Rajendra Navaratnam (Sonia Abraham); M/s Azman, Davidsan & Co

For the defendant - Ramdass (Ernest Azad); M/s Ernest Azad & Assocs

For the 3rd party - Bharti Seth; M/s Bharti Seth & Asocs

Reported by Suresh Nathan

JUDGMENT

Yaacob Ismail J:

The Plaintiff's Claim

The plaintiff has brought an action against the defendant arising out of a contract dated 21 September 1991 and amended contract dated 11 January 1993 (see statement of claim - encl. 37). The plaintiff for purposes of transportation of equipment to Libya appointed the third party as freight forwarders. On 6 June 1997 by encl. 58 the plaintiff filed a statement of claim against third party.

Against the defendant the plaintiff sought:

(a) Declaration that the plaintiff has performed its obligations under its contract with the defendant dated 21 September 1991.

(b) Injunction to restrain the defendant from making a demand on the performance bond for the amount of RM1,000,000 drawn by the plaintiff in favour of the defendant.

(c) Sum of RM523.000 being the remaining contract sum.

(d) Additional shipping cost of RM28.880.04.

(e) Damages etc.

Against the third party the plaintiff sought:

a) Declaration that the plaintiff is entitled to be indemnified by the third party.

b) Judgment for any amount due from the plaintiff to the defendant.

c) Judgment for any costs paid by plaintiff to the defendant and plaintiff's costs for the proceeding against third party.

Facts

Some time in December 1990 Fu Chee Cheng (DW5) representing the defendant entered into negotiations with a trade organisation in Libya, JOWFE, for manufacture of a certain equipment in Malaysia. He informed JOWFE that the defendant could play the role of middleman and an invitation was sent to the plaintiff on 23 January 1991 as potential subcontractor for the contract.

Brian Nesbitt (PW1) of the plaintiff company requested for an end use certificate for the equipment and this was forwarded to the plaintiff. Brian Nesbitt also subsequently met the technical manager/chief engineer of JOWFE, Mohammed Khaled and also verified with the customs department on exports to Libya and obtained approval from the plaintiff's headquarters in London for the contract.

On 19 March 1991 the defendant procured a letter of credit from Al Jawaby, the trading arm of JOWFE based in London for Sterling Pound 879,957. This was subsequently amended to USD1,583,922.60.

On 21 September 1991 an agreement was signed between the defendant and the plaintiff for the manufacture and supply of the equipment at the price of RM2,348,445. The contract was cost and freight (C&F) Benghazi and transhipment was prohibited. The port of loading was any Malaysian port.

The defendant paid 40% of the contract price, ie, RM939.378 in exchange for which the plaintiff furnished a bank guarantee.

In compliance with the C&F contract, the plaintiff sourced a ship "Ocean Regina" from Port Kelang to Benghazi but suddenly on 6 November 1992 the plaintiff sent to the defendant a letter claiming a possible "design fault" in the equipment and that the plaintiff was not able to ship the equipment until further notice. Brian Nesbitt (PW1) admitted in his evidence that the statement was not true.

The defendant was thus compelled to draw down on the bank guarantee for the refund of the money and applied to court for specific performance of the contract. The court granted an order for specific performance against the plaintiff on 8 January 1993.

The plaintiff and defendant then entered into an amended contract on the following terms:

(i) the equipment would be shipped on a C&F basis to Benghazi by the plaintiff. Transhipment was prohibited;

(ii) the contract price was revised to RM1,523,000;

(iii) the defendant will accept the equipment in the present condition and state of completion;

(iv) the defendant would pay the plaintiff an advance sum of RM1 million in exchange for a bank guarantee provided by the plaintiff;

(v) the balance of RM523.000 would be settled by the defendant by a letter of credit.

Pursuant to the amended contract,

a) the defendant paid to the plaintiff a sum of RM1 million on 18 January 1993;

b) in exchange for the advance payment, the plaintiff furnished to the defendant a performance bond issued by a bank to the defendant guaranteeing payment to the defendant any amount claimed by the defendant not exceeding RM1 million for the seller's default for their obligations under the contract.

Since the balance sum of RM523,000 was to be paid by a letter of credit opened by the defendant, the plaintiff's finance director, Siah Yang Tit (PW2) negotiated on behalf of the defendant for a letter of credit to be opened by Hongkong Bank.

The letter of credit stipulates;

(i) Transhipment is not allowed;

(ii) Shipment is from Shah Alam/Port Klang to Libya or beneficiary's godown.

The plaintiff began to source for a ship to carry the cargo to Benghazi. On 11 January 1993 the plaintiff arranged for a ship "Concord Furano" leaving Singapore on 20 January 1993. Since the defendant's present letter of credit referred to shipment from a Malaysian seaport, Brian Nesbitt (PW1) requested from Fu Chee Cheng (DW5) an amendment to the letter of credit to include shipment from Singapore. This was accordingly arranged. However, transhipment was still prohibited. The plaintiff then notified the defendant that the ship "Concord Furano" was not available.

The plaintiff then suggested another ship MV "Antje" on 18 January 1993. On the same day the defendant received a letter from a freight forwarder Eurotrans Charter Sdn Bhd (Third Party) seeking an introduction to the plaintiff for shipment of the goods.

On 19 January 1993, Nah Swee Hua (TPW1) of the third party met Fu Chee Cheng (DW5) and informed him of the availability of the ship "Lady Jane" for the shipment. Fu Chee Cheng then informed Mohammed Khaled of JOWFE of the two ships then available, and he opted for "Lady Jane".

On 20 January 1993 the defendant wrote to the third party informing them that the third party should deal directly with the plaintiff. Defendant also wrote to the plaintiff introducing them to the third party.

On 19 January 1993, the shipment *via* MV "Antje" suggested by the plaintiff became unavailable.

On 20 January 1993 the plaintiff appointed the third party as freight forwarder for the shipment. On 21 January 1993 the third party sent a letter to the plaintiff giving details of the shipment and freight costs. Shipment will be from Port Klang to Benghazi.

However, on the same day ie, 21 January 1993 the plaintiff through Brian Nesbitt (PW1), sent a fax to AG Ball of APV SEA Pte Ltd, Singapore stating that there would be a feeder vessel named "Seng Leong" for the shipment from Port Klang to Singapore and from there shipment would be on the "Lady Jane" scheduled for the first week of March 1993. The letter was not copied to the defendant.

A customs form entitled "Declaration of Goods to be exported" dated 30 January 1993 prepared by the plaintiff's shipping officer named Arumugam

a/l Vadivelu confirms that the goods were loaded on a feeder vessel "Seng Leong" from Port Klang and not on the "Lady Jane".

However, the bill of lading dated 2 February 1993 upon which the plaintiff relies for performance of the contract and to draw down on the letter of credit for the balance sum of RM523.000 shows that the equipment was shipped on board the "Lady Jane" at Port Klang enroute directly to Benghazi.

In their letter to the Hongkong Bank dated 15 February 1993, the plaintiff stated that the consignment was pre carriaged by MV "Seng Leong" out of Port Klang on 2 February 1993 for reloading on ocean vessel "Lady Jane". But Brian Nesbitt (PW1) and Siah Yang Tit (PW2) admitted that the goods were never loaded on the "Lady Jane".

Nan Swee Hua (TPW1) requested from the plaintiff for instructions for the goods to be brought back from Singapore to Port Klang. The plaintiff's solicitors replied that the plaintiff had no further interest in the goods.

Plaintiff's Case

Just prior to the completion of the manufacture of the eight stainless steel vessels ("equipment") for the defendant, the plaintiff was instructed by its parent company in the United Kingdom to cease manufacture and not to deliver the equipment to the defendant. The plaintiff then came to a compromise with the defendant agreeing to ship the equipment in their existing state of completion.

The defendant presented two shipping options to JOWFE, the defendant's Libyan principal. One, emanating from the plaintiff's freight forwarder and the other from the third party. JOWFE chose the third party's shipping option which involved shipment in an ocean vessel called the "Lady Jane". The third party arranged for shipment out of Port Klang, using a feeder vessel, the "Seng Leong", to transport the goods to Singapore, where it would be warehoused awaiting the arrival of the "Lady Jane" to continue its journey to Benghazi, Libya. This arrangement involves transhipment.

The third party duly shipped the equipment from Port Klang on behalf of the plaintiff and tendered the shipping documents to the defendant, in particular the bill of lading. The bill of lading and other shipping documents were transmitted to JOWFE's bank in London, and the defendant was paid in full on its letter of credit. The defendant then, on the last available day, instructed the bank to reject the shipping documents tendered by the plaintiff on the basis that there had been a transhipment, and instructed the bank not to pay the plaintiff's letter of credit.

The bank rejected the shipping documents tendered by the plaintiff and declined to pay on the plaintiff's letter of credit.

The plaintiff claims the balance of the purchase price of RM523,000 additional shipping costs of RM28,880, a declaration that it has performed its contract and permanent injunction restraining payment on its bank guarantee for RM1,000,000.

Defendant's Case

The ownership of the equipment at all material times remained with the plaintiff since the equipment was never loaded on board the "Lady Jane" in Singapore. In a C&F contract it is the responsibility of plaintiff to ensure that the equipment is put on board a ship bound for Benghazi. Since the equipment was never loaded on the ship named in the bill of lading, the plaintiff has not performed the C&F contract and is therefore not entitled to payment pursuant to the contract.

The shipment on the feeder vessel "Seng Leong" amounts to transhipment and by doing so the plaintiff's has not performed the contract.

The defendant conunterclaims for the sum of RM1 million which was paid as advance for the contract and in return for which the plaintiff issued a performance bond should be drawn down by the defendant. The defendant sought an order that the interlocutory injunction granted on 13 March 1993 be set aside to allow the defendant to draw on the performance bond to claim the RM1 million. The defendant also claims damages in the sum of RM2,436,806 and interest.

Third Party's Case

The third party was appointed by the plaintiff and was at all material times acting as a forwarding agent of the plaintiff. Third party took all instruction from the plaintiff and the plaintiff was given two options for transporting the equipment. The plaintiff was aware at all material times of the mode of shipment and the bill of lading was handed to the defendant by third party at the instruction of the plaintiff. The third part has discharged its obligations under the forwarding contract and was paid by the plaintiff in full for the service rendered.

Findings

In the instant case it would appear the defendant has absolutely lost the right to reject the equipment simply because the equipment was never shipped on board the ship named in the bill of lading nor shipped on any ship bound for the destination named in the bill of lading. The contract between the Plaintiff and the defendant was a C&F contract. The equipment was never leaded on board the "Lady Jane" or any other ship bound for Benghazi, Libya. Due to this the ownership of the equipment at all material times remains with the plaintiff.

In *Hindley & Co Ltd v. East Indian Produce Co Ltd* [1973] Vol. 2 Lloyd's Law Reports 515 QBD, the sellers sold to the buyers 50 tons of Siamese jute, grade A, C&F Bremen at a price of Pound 80 per ton, shipment October/ November/December, 1968, at seller's option, cost against documents on or before arrival of the steamer. On 27 January 1969, the sellers tendered a bill of lading dated 30 December 1968, which they had obtained from a third party from whom they had purchased a quantity of jute, and which stated that 275 bales of grade A jute had been shipped on board the steamship Peramataris at Bangkok. On 5 March 1969, the buyers paid the sellers the contract price of Pound 3960. When the vessel arrived at Bremen, no jute of the contract description was found to be on board because it had never been shipped. A dispute arose and the matter was referred to the committee of the London Jute Association who awarded to the buyers (i) Pound 1751.97 (being the price paid less a certain sum which the buyers had recovered from the vessel's owners in a claim brought by them in Germany); and (ii) Pound 585 for the difference between the contract and market prices at Bremen in April, 1969. The award was stated in the form of a special case, the question for the court being:

Whether on the facts found and the true construction of the sale contract the buyers are entitled to the return of the price paid by them and or damages for breach of contract by the sellers.

Kerr J held in confirming the award:

(1) the sellers were in breach of the obligation under a C&F contract to ship or procure the shipment of goods of the contractual description, for no goods had in fact been shipped.

(2) it was an implied term in a C&F contract that the bill of lading should not only appear to be true and accurate in the material statements which it contained, but that such statements should in fact be true and accurate, and in the present case the bill of lading which was tendered was not a proper one, and therefore the seller were in breach on that ground also.

(3) it was immaterial whether the buyers had a right of action against the carriers.

In another case *Panchaud Freres SA v. Etablissement General Grain Company* [1970] Vol. 1 Lloyd's Law Report 53, CA the facts are these. By contract dated 14 May 1965, sellers sold to buyers 5500 metric tons Brazilian yellow maize cif Antwerp. Contract provided (*inter alia*):

> SHIPMENT: To take place from (a) Brazillian port/s not North of Santos during the period of June/July, 1965.

Contract incorporated all the term and conditions of London Corn Trade Association contract form No. 77 which provided (*inter alia*):

> Bill of Lading to be considered proof of date of shipment in the absence of evidence to the contrary... .

Pursuant to the contract, sellers tendered to buyers, *inter alia*, a bill of lading in respect of 200 metric tons of Brazilian yellow maize shipped on African Night. The bill of lading was dated July 31, 1965. Other shipping documents tendered included a certificate of quality, which stated in respect of the 200 tons: "Loaded on 10 to 12 August 1965". On arrival of the vessel at Antwerp, the buyers refused to take delivery of the 200 tons on the ground that the number of bags did not correspond with the number stated in the bill of lading, and commenced arbitration proceedings to recover the purchase price.

Lord Denning, MR at p. 56 (left column) stated as follows:

> However that may be, they are distinct obligations, and the right to reject the documents arises when the documents are tendered, and the right to reject the goods arises when they are landed and when after examination they are found not to be in conformity with the contract. There are many cases, or course, where the documents are accepted but the goods are subsequently rejected. It may be that if the actual date of shipment is not in conformity with the contract, and the error appears from the documents, the buyer, by accepting the documents, not only loses his right to reject the documents, but also his right to reject the goods, but that would be because he had waived in advance reliance on the date of shipment.

Coming back to the present case plaintiff and defendant entered into an amended contract on 11 January 1993 on the following terms:

(i) the equipment would be shipped on a C&F basis to Benghazi by the plaintiff. Transhipment was prohibited.

(ii) the contract price was revised to RM1,523,000

(iii) the defendant will accept the equipment in the present condition and state of completion;

(iv) the defendant would pay the plaintiff an advance sum of RM1,000,000 in exchange for a bank guarantee provided by the plaintiff;

(v) the balance of RM523,000 would be settled by the defendant by a letter of credit.

Despite the prohibition against transhipment the plaintiff shipped the equipment on board the "Seng Leong" out of Port Klang on 2 February 1993 for reloading on another vessel "Lady Jane". It was a fact that the equipment was never

loaded on the "Lady Jane". In the result the equipment was stranded in Singapore. The plaintiff has clearly not complied with the principal term of the contract regarding transhipment and therefore in breach of the agreement with the defendant.

It is also noted that the bill of lading dated 2 February 1993 which the plaintiff relies for performance of the contract and to draw down on the letter of credit for the balance sum of RM532,000 shows that the equipment was shipped on board the "Lady Jane" at Port Klang enroute directly to Benghazi.

This certainly is not the true situation. The plaintiff admitted that this is not true in their letter to the Hongkong Bank dated 15 February 1993.

As for the liability of the third party, it is clear that the third party was in fact appointed by the plaintiff on 20 January 1993.

The plaintiff was aware from as early as 21 January 1993 ie, one day after the third party was appointed as the fowarding agent, that the equipment was to be shipped on the ship "Seng Leong" from Port Klang to Singapore and then kept at the Pasir Panjang wharf before it is boarded on the "Lady Jane" from Singapore. This fact can be ascertained from the evidence of plaintiff's witness Brian Nesbitt, who sent a fax to his superior Mr Ball in Singapore informing him of the arrival of the feeder vessel "Seng Leong" and subsequent storage of the cargo in Singapore at Pasir Panjang. This proves that the plaintiff knew of the transhipment. The plaintiff also instructed the third party to notify the defendants of the freight charges for Port Klang to Benghazi as the defendant had agreed to pay the freight charges.

The third party discharged its obligations as the forwarding agent to the plaintiff and accordingly the third party invoiced the plaintiff for the services rendered. Third party was paid in full *vide* plaintiff's cheque dated 2 February 1993. The payment was for freight and forwarding agency.

The plaintiff's stand on the bill of lading is rather baffling. On the one hand the plaintiff denied that they were the shipper on the bill of lading and claimed that the shipper should have been Pacific Wide. On the other hand, when third party sought their instructions on what to do with the equipment in Singapore, the plaintiff claimed they had no interest in the goods and the instruction should come from Pacific Wide. The plaintiff made no effort to bring the equipment back to their warehouse in Shah Alam.

Under the circumstances I hold the third party is not liable to the plaintiff as third party had carried out their duties on the instructions given by the plaintiff and the plaintiff was fully aware of what was happening. The plaintiff did not want to associate themselves with the export of this equipment for the reason

that such export has attracted the attention of government authorities in London and Singapore in light of then existing embargo against Libya. This is probably the reason why the plaintiff did not want to be named as the shipper or exporter in the bill of lading. As far as the third party is concerned it merely took instructions from the plaintiff, discharged its duties and get paid for its services.

On the facts and circumstances of this case at the conclusion of the trial the decision of the court is as follows:

i) The plaintiff's claim is dismissed with costs. The shipment of the equipment under the C&F contract never took place.

ii) On the defendant's counterclaim:

a) a sum of RM1,000,000 to be drawn down by the defendant. The interlocutory injunction dated 13 March 1993 obtained by the plaintiff is set aside to enable the defendant to draw down the said sum;

b) the court is unable to make any award of damages since there was no evidence of damages suffered by the defendant has been adduced;

c) interest at 8% pa on the sum of RM1,000,000 from date of judgment until full settlement;

d) Costs of the action.

iii) The plaintiff's claim against the third party is also dismissed with costs.

After judgment was given the plaintiff's counsel applied for Erinford injunction to restrain the defendant from making a demand on the performance bond pending the appeal. The application was objected to by both counsel for the defendant and the third party. They submitted the judgment was obtained after a prolonged trial and the case had started in 1993. The defendant should not be deprived of the fruits of judgment after waiting for six years.

After considering the submissions in my view there is no merit in the application. The defendant has been restrained by an injunction granted to the plaintiff since 13 March 1993. Any further injunction will greatly prejudice the defendant. The application for Erinford injunction was dismissed.